Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

DOWNTOWN FRANKFORT, INC. and JOHN GRAY, individually and as President of Downtown Frankfort, Inc.,

Cross-Petitioners,

vs.

CAPITAL AREA RIGHT TO LIFE, INC.,

Cross-Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Kentucky

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a private non-profit 501(c)(3) corporation, which is formed by local citizens to revitalize a downtown area through historic preservation, and which is partially funded by state funds, act under color of state law for purposes of 42 U.S.C. § 1983, when it holds a Halloween festival on public property and denies other groups the right to participate in the festival, when the other groups' reasons for wishing to participate in the festival are incompatible with the theme of the festival?

2. Do the volunteer board members and officers of a private, non-profit 501(c)(3) corporation, which has been formed by local citizens to revitalize a downtown area through historic preservation, and which is partially funded by state funds, act under color of state law for purposes of 42 U.S.C. § 1983, when they hold a Halloween festival on public property and deny other groups the right to participate in the festival, when they determine that the other groups' reasons for wishing to participate in the festival are incompatible with the theme of the festival?

3. May a local, private, non-profit 501(c)(3) corporation and its officers and board members maintain a festival policy which excludes individuals and groups from participating in a festival held on public property, where it is determined that the other individuals' or groups' reasons for wishing to participate in the festival are incompatible with the theme of the festival, without violating the United States Constitution?

PARTIES

Cross-Respondent, Capital Area Right to Life, Inc. (CARTL) is a non-profit corporation.

Cross-Petitioner Downtown Frankfort, Inc. (DFI) is a private, non-profit 501(c)(3) corporation. It has no parent company or subsidiaries.

Cross-Petitioner, John Gray, is a private individual, who at the time of this action was the President of DFI, serving in a volunteer, non-paid capacity.

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The Cross-Petitioners respectfully request that the Cross-Petition for Writ of Certiorari be granted.

DECISIONS BELOW

The decision of the Supreme Court of Kentucky is reported as *Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc.*, 862 S.W.2d 297 (Ky. 1993). The order denying rehearing is unreported.

The decisions of the Court of Appeals of Kentucky and the Franklin Circuit Court are not reported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. amend. XIV, § 1.

The Petition for Writ of Certiorari was received on January 31, 1994.

STATEMENT OF THE CASE

Downtown Frankfort, Inc. (DFI) is a private, non-profit 501(c)(3) corporation, which was established in 1988 under the laws of the Commonwealth of Kentucky, by private citizens of Frankfort and Franklin County, Kentucky in order to help bring about downtown revitalization in Frankfort, Kentucky, through historic preservation.

DFI participates in the Kentucky Main Street Program, which is a highly successful program developed by the National Trust for Historic Preservation for revitalizing downtown areas through historic preservation.

At the time of this action, DFI was governed by a Board of seventeen volunteer directors. Fourteen directors were elected by the membership of DFI. The remaining three director positions were filled by one representative from the City of Frankfort, one representative from the Franklin County Fiscal Court and one representative from the Frankfort-Franklin County Chamber of Commerce. DFI's by-laws have since been amended and neither the City of Frankfort nor the Franklin County Fiscal Court is currently represented on DFI's Board.

John Gray was, at the time of this action, the duly elected President of DFI's Board of Directors, serving as a volunteer in an unpaid capacity.

DFI was, at the time of this action, funded by monies received from the Kentucky Heritage Council, the City of Frankfort, the Franklin County Fiscal Court, and from DFI's membership.

In pursuit of its goal of helping to bring about downtown revitalization through historic preservation, DFI's by-laws provided for the creation of a Promotions Committee.

One of the goals of DFI's Promotions Committee was that of promoting a positive image of downtown Frankfort as an interesting and exciting place to shop, work, live and visit.

One of the activities that DFI's Promotions Committee undertook to achieve the goal of promoting a positive image of downtown Frankfort, was the activity of sponsoring and organizing festivals in downtown Frankfort.

In 1989, DFI's Promotions committee organized and sponsored two major downtown festivals – "Dog Days" in August, and "The Great Pumpkin Festival" in October. Each festival had its own individual theme.

The theme of "Dog Days" was "Dog – man's best friend," and the activities and events for that day were organized around that theme.

"The Great Pumpkin Festival" had a theme of Halloween and Fall Harvest, and, again activities and events were organized around that theme.

As part of the 1989 "Great Pumpkin Festival," DFI's Promotions Committee received permission from the City of Frankfort for DFI to use St. Clair Mall on Saturday, October 28, 1989, as a place to hold "Great Pumpkin Festival" activities, and as a place to allow vendors, civic groups, and others to set up sales and informational booths. St. Clair Mall is a pedestrian mall in downtown Frankfort that is one block long and a street-width wide.

St. Clair Mall was formerly a through street which was converted into a pedestrian mall in the 1960's.

At the time of the 1989 Great Pumpkin Festival, DFI did not have policy on festival participation.

Capital City Area Right to Life, Inc. (CARTL), the Cross-Respondent in the case at bar, was one of the groups that requested and was granted permission to participate in the 1989 Great Pumpkin Festival, and accordingly, maintained a booth on St. Clair Mall on the day of the 1989 Great Pumpkin Festival.

As the day of the 1989 Great Pumpkin Festival began, however, DFI's Promotions Committee and Board members almost immediately began receiving complaints from other festival participants, as well as many festival-goers, about the inappropriateness of having advocacy groups, such as CARTL, participating in a family-oriented Halloween/Fall Harvest Festival. In particular, people objected to CARTL passing out plastic fetuses to children.

In response to such complaints, and the resulting disruption caused at the 1989 Great Pumpkin Festival, DFI's Promotions Committee adopted a policy of reserving the right to deny any group's request to participate in a DFI sponsored festival, if it was determined that the group's activity would not be in keeping with the theme or spirit of the festival.

This policy was not aimed at any one particular group or individual, but was, rather, adopted in order to allow DFI to better maintain the integrity of the theme of

each particular festival, and to avoid giving the appearance of DFI support or approval of any group's advocacy position or point of view.

Neither state, city nor county representatives participated in the decision of DFI's Promotions Committee to adopt the festival participation policy in question.

In preparation for the 1990 "Great Pumpkin Festival", DFI once again requested and received permission from the City of Frankfort to use St. Clair Mall for festival related activities on Saturday, October 27, 1990. This "use" of St. Clair Mall was limited to the day of the festival, and was in no way accompanied by a grant from the city for DFI to use any police powers to control the flow of pedestrian traffic on the mall.

CARTL, again, asked for permission to participate in DFI's festival and to have a booth at the 1990 "Great Pumpkin Festival".

This time, however, CARTL was informed by John Gray, acting in his capacity as President of DFI, that DFI had adopted a festival policy that would preclude CARTL, and any other group whose activities at the festival would not be in keeping with either the theme or the spirit of the festival, from participating in the 1990 "Great Pumpkin Festival".

In addition to denying CARTL's request to participate in the 1990 "Great Pumpkin Festival", DFI's Promotions Committee also denied participation requests from the Kentucky Organization of Women, and the Kentucky Religious Coalition for Abortion Rights, for reason that the activities of both of these groups (i.e. advocating a

pro-choice position on this issue of abortion) were, also, deemed not to be in keeping with the Halloween/Fall Harvest theme of the "Great Pumpkin Festival".

At its October 2, 1990 Board of Directors meeting, the Board of DFI formally adopted the following festival policy, and directed John Gray, as President, to advise CARTL of DFI's festival policy, and affirm the earlier denial of CARTL's request to participate in the 1990 Great Pumpkin Festival:

> "Since DFI sponsored theme festivals, events, and booths are meant to be for fun and entertainment, DFI reserves the right to deny participation to any displayer/merchandiser deemed inappropriate to that theme and purpose."

Neither state, city nor county government coerced or encouraged DFI's Promotions Committee or Board of Directors to deny CARTL's request to participate in the 1990 "Great Pumpkin Festival". In point of fact, at the October 2, 1990 meeting of the DFI's Board of Directors, Kenneth L. Thompson, the City representative on DFI's Board, voted against adopting a festival participation policy. At this same board meeting, Mr. Thompson also voted against denying CARTL's request to participate in the 1990 "Great Pumpkin Festival".

Neither did state, city nor county government contribute monies to help fund DFI's 1990 "Great Pumpkin Festival".

Following DFI's October 2, 1990 decision to deny CARTL's request to participate in the 1990 "Great Pumpkin Festival", the Franklin County Attorney wrote the President of DFI a letter which stated his opinion that

DFI's festival participation denied CARTL a "fundamental and constitutional right to maintain their booth," and which urged DFI not to deny CARTL the right to participate in the festival.

On October 18, 1990, CARTL filed an action in the Franklin Circuit Court pursuant to 42 U.S.C. § 1983, claiming that John Gray and DFI were state actors. CARTL further alleged violations of its first and fourteenth federal constitutional rights, and along with its complaint filed a motion for a temporary injunction.

DFI filed a motion to dismiss on October 23, 1990.

On October 24, 1991, a hearing was held on both CARTL's motion for injunctive relief and DFI's motion to dismiss.

At the October 24, 1991 hearing, DFI's Motion to Dismiss was treated as a Motion for Summary judgment.

On October 26, 1991 after having considered both sides' motions, the Franklin Circuit Court entered an Order which held that neither DFI nor John Gray were state actors and that CARTL, therefore, had not been denied any constitutional rights.

CARTL then appealed the Circuit Court's decision to the Kentucky Court of Appeals.

The Kentucky Court of Appeals affirmed the Franklin Circuit Court's decision, holding that DFI and John Gray were private parties.

CARTL then filed a Motion for Discretionary Review with the Kentucky Supreme Court. The Motion was granted and the Kentucky Supreme Court, after having

heard oral argument, entered an Opinion on July 1, 1993, which affirmed the Kentucky Court of Appeals' Opinion that CARTL had not been denied any constitutional rights.

The Kentucky Supreme Court, however, disagreed with the rationale of the lower courts and held that DFI and John Gray were state actors, but further held that DFI's festival booth policy was constitutionally valid.

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted in this case because:

1. The Supreme Court of Kentucky's decision that a local, private, non-profit corporation and its volunteer board members act under color of state law when they hold a festival on public property is in direct conflict with the decision of the U.S. Supreme Court.

The United States Supreme Court has, over the years, articulated a number of different factors or tests to be used to determine, in different contexts, whether the actions of a private party can be deemed to be state action.

Those tests and factors are discussed as follows:

1. The Public Function Test

The Public Function Test is narrowly drawn and covers only private parties who perform functions that are traditionally the *exclusive* perogative of the state. *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974).

2. State Compulsion Test

Under the State Compulsion Test, a finding of state action is limited to instances in which the government has coerced or at least significantly encouraged the action which has resulted in the alleged constitutional violation. *San Francisco Arts and Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987).

3. Nexus/Symbiotic Relationship Test

The Nexus/Symbiotic Relationship Test requires asking whether the State had so far insinuated itself into a position of interdependence with the private party that it was a joint participant in the enterprise. *Jackson*, 419 U.S. at 357-58, 95 S. Ct. at 456-57.

In order to charge a private party with state action under the standard, the governmental body and private party must be intertwined in a "symbiotic relationship." *Id.* at 347, 95 S. Ct. at 456-57.

For example, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961), the Court found a symbiotic private-state relationship to

exist, where a privately-owned restaurant, which discriminated against racial minorities, leased space in a government parking facility.

4. *Tarkanian* Test

The case of *NCAA v. Tarkanian*, 488 U.S. 179, 109 S. Ct. 454, 102 L. Ed. 2d 469, (1988), suggests that state action may occur if:

1. The state creates the legal framework governing the conduct.
2. The state delegates its authority to the private actor.
3. The state knowingly accepts the benefits derived from the unconstitutional behavior.

5. *Lugar* Test

In its two most recent "state action" cases, *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991) and *Georgia v. McCollum*, ___ U.S. ___, 112 S. Ct. 2340, 120 L. Ed. 2d 33, (1992), the United States Supreme Court used the two step inquiry set forth in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982), to determine whether state action was present.

Under *Lugar* the first inquiry is whether the claimed constitutional deprivation has resulted from the exercise of a right or privilege having its source in state authority. 102 S. Ct. at 2755.

The second inquiry under *Lugar* is whether the private party charged with the deprivation can be described as a state actor. 102 S. Ct. at 2755-2756.

As to the second *Lugar* inquiry, the U.S. Supreme Court in both *Edmonson* and *McCollum* found it useful to apply three principles:

1. The extent to which the actor relies on governmental assistance and benefits. "Our cases have found state action when private parties make extensive use of state procedures with 'the overt, significant assistance of state officials'." *Edmonson*, 111 S. Ct. 2084.

2. Whether the actor is performing a traditional governmental function.

3. Whether the injury caused is aggravated in a unique way by the incidents of governmental authority.

In the case at bar, the Kentucky Supreme Court ignored the U.S. Supreme Court decisions cited above and instead substituted its own "aggregate" test, which it misattributed to *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

The Writ of Certiorari should, therefore, be granted, in order to correct the Kentucky Supreme Court's departure from the line of cases decided by the United States Supreme Court regarding whether the actions of private parties constitute state action.

2. The Supreme Court of Kentucky's decision that a local, private, non-profit corporation and its unpaid volunteer board members act under color of state law when they adopt and enforce a festival policy designed to maintain the integrity of the theme of a festival sponsored by the nonprofit, erroneously puts such non-profit and its board members

at risk for money damages under 42 U.S.C. 1983, with such risk having a chilling effect on the willingness of citizens to serve on non-profit boards.

Read broadly, the Kentucky Supreme Court decision holds that receipt of state funds and use of public property converts private action into state action.

For example, if a local, private non-profit arts group were to receive a grant from a state agency to hold an art exhibit, and if the local group were to hold the art exhibit on public property, and were to exercise control over who could and who couldn't participate in the exhibit, under the Kentucky Supreme Court's "aggregate" approach, the local art group would be acting under color of state law and its volunteer offices and board members would be subject to money damages under 42 U.S.C. 1983.

In addition to such a result being contrary to the holding in the state action cases of the United States Supreme Court cited above, the Kentucky Supreme Court decision will have the practical and chilling effect of discouraging private individuals who would otherwise be willing to perform useful volunteer community service by serving on local, private non-profit boards, knowing the risk of being held to have acted under color of state law for simply having sponsored an art exhibit or festival.

CONCLUSION

The Writ of Certiorari should be granted in order to correct the Kentucky Supreme Court's departure from the line of United States Supreme Court cases which determine the actions of private parties can be deemed to be state action.

Respectfully submitted,

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BRIEF IN OPPOSITION TO CROSS-PETITION

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BRIEF IN OPPOSITION TO CROSS-PETITION

INTRODUCTION

Capital Area Right to Life, Inc. (CARTL),[1] petitioner in No. 93-1201 [2] and cross-respondent in No. 93-1384, hereby opposes the cross-petition of Downtown Frank-

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[1] CARTL is a nonprofit corporation. It has no parent company or subsidiaries. *See* Rule 29.1.

[2] The petition in No. 93-1201 is captioned *Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc.*

fort, Inc. (DFI), respondent in No. 93-1201 and cross-petitioner in No. 93-1384.

The basic scenario of this litigation is straightforward. DFI sponsors and promotes festivals on public forum property in the City of Frankfort, Kentucky. These festivals feature booths in which vendors, civic groups, and others promote themselves and their activities. In 1989, DFI permitted CARTL to operate a booth in the "Great Pumpkin Festival." In 1990, DFI denied permission for abortion advocacy groups (pro and con), including CARTL, the Kentucky National Organization for Women, and the Kentucky Religious Coalition for Abortion Rights, to have booths at the festival.

CARTL sued in state court for declaratory and injunctive relief, charging unconstitutional content-based discrimination against CARTL's speech. DFI responded by arguing that DFI was free to discriminate because DFI was not a state actor subject to the Fourteenth Amendment.

The state trial court and appeals court sustained DFI's defense that there was no state action. The Supreme Court of Kentucky disagreed and held DFI to be a state actor; nevertheless, the state supreme court affirmed the judgment in DFI's favor, holding that DFI's discriminatory policy was not an unconstitutional restriction on free speech.

CARTL petitioned this Court for review on the free speech question, No. 93-1201, and DFI has cross-petitioned on the state action question, No. 93-1384.

REASONS FOR DENYING THE WRIT

Both CARTL and DFI agree that the decision of the Supreme Court of Kentucky was incorrect as a matter of federal constitutional law. CARTL takes issue with the state supreme court's ruling on the merits of CARTL's claim of free speech. DFI takes issue with the state supreme court's ruling on the merits of DFI's defense of no state action. Only CARTL, however, suffered an adverse *judgment* in the state supreme court. Therefore, only CARTL can petition this Court for review.

CARTL has sought review on the free speech issues. *See* Pet. for Cert., No. 93-1201. DFI has not questioned the "certworthiness" of this petition. Response to Pet., No. 93-1201. Instead, DFI seeks by its cross-petition to place before this Court the state action issue as well.

There are two basic reasons why this Court should not grant the cross-petition.

First, the cross-petitioners lack standing to seek review. The judgment of the Supreme Court of Kentucky—affirming summary judgment for DFI—was entirely *favorable* to DFI. "[A]s the successful party below[, DFI] has no standing to appeal from the decree . . . ," *Public Serv. Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) (per curiam) (dismissing appeal). *Accord New York Tel. Co. v. Maltbie*, 291 U.S. 645, 645 (1934) (per curiam) (dismissing appeal). While DFI may disagree with the state supreme court's *opinion*, "this Court reviews judgment, not opinions." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (footnote omitted). Thus, this Court should dismiss DFI's cross-petition.

Second, DFI's cross-petition is unnecessary. A respondent may defend the judgment below, without a cross-petition, on any ground which the law and record permits and which would not expand the relief it has been granted. *United States v. New York Tel. Co.*, 434 U.S.

159, 166 n.8 (1977). *See generally* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 363-64 (7th ed. 1993) (collecting cases). Should this Court grant CARTL's petition in No. 93-1201, DFI is free to urge affirmance on the basis of its state action defense.[3] Therefore this Court should in any event deny DFI's cross-petition.

CONCLUSION

Accordingly, this Court should either dismiss the cross-petition for lack of jurisdiction or, in the alternative, deny the cross-petition as unnecessary.[4]

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March 16, 1994

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[3] Of course, this Court retains the discretion to limit its review to the precise questions presented in the petition for certiorari. *E.g., National Organization for Women v. Scheidler,* 114 S. Ct. 798 (1994) (declining to address alternate grounds for affirmance urged by respondents).

[4] It bears mention as well that DFI's cross-petition regularly and improperly goes outside—or even contrary to—the record in this case. Perhaps most egregious is DFI's astonishing denial that government funds helped pay for the 1990 "Great Pumpkin Festival." Cross-Pet. at 7. This contradicts DFI's own acknowledgment that DFI was funded by government agencies. *See id.* at 3. DFI cannot simultaneously dispute the material facts while claiming entitlement to summary judgment in its favor.